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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

17 **ERIK KNUTSON KEVIN
LEMIEUX, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**
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 19

20 **PLAINTIFFS,**
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 22

23 **V.**
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 25 **SCHWAN'S HOME SERVICE,
INC.; AND CUSTOMER ELATION,
INC.,**
 26
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28 **DEFENDANTS.**

Case No: 12-CV-964 GPC (DHB)

Class Action

**SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF PURSUANT TO THE
TELEPHONE CONSUMER PROTECT
ACT, 47 U.S.C § 227 ET SEQ.**

JURY TRIAL DEMAND

INTRODUCTION

1. ERIK KNUTSON (“Knutson”) and KEVIN LEMIEUX (“Lemieux”), referred to jointly as
“Plaintiffs,” bring this class action for damages, injunctive relief, and any other available
legal or equitable remedies, resulting from the illegal actions of SCHWAN’S HOME
SERVICE, INC. (“SCHWAN”) and CUSTOMER ELATION, INC. (“CUSTOMER
ELATION”) and their related entities, subsidiaries and agents, referred to jointly as
“Defendants,” in negligently, knowingly, and/or willfully contacting Plaintiffs on
Plaintiffs’ cellular telephones, in violation of the Telephone Consumer Protection Act, 47
U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiffs’ privacy. Plaintiffs allege as
follows upon personal knowledge as to themselves and their own acts and experiences,
and, as to all other matters, upon information and belief, including investigation conducted
by their attorneys.

JURISDICTION AND VENUE

1. This Court has federal question jurisdiction because this case arises out of violation of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
2. Venue is proper in the United States District Court for the Southern District of California pursuant to 18 U.S.C. § 1391(b) because the events giving rise to Plaintiffs' causes of action against Defendants occurred within the State of California and Defendants conduct business in the County of San Diego.

PARTIES

3. Plaintiffs are, and at all times mentioned herein were, individual citizens and residents of the State of California and County of San Diego.
4. Plaintiffs are informed and believe, and thereon allege, that Defendant SCHWAN is, and at all times mentioned herein was, a corporation whose primary corporate address is 115 West College Drive, Marshall MN 56258.
5. Defendant SCHWAN is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10). Plaintiffs are informed and believe, and thereon allege, that at all times relevant Defendant SCHWAN conducted business in the State of California and in the County of San Diego.

6. Plaintiffs are informed and believe, and thereon allege, that Defendant CUSTOMER
ELATION is, and at all times mentioned herein was, a corporation whose primary
corporate address is in Bloomington, Minnesota.

7. Defendant CUSTOMER ELATION is, and at all times mentioned herein was, a
corporation and a “person,” as defined by 47 U.S.C. § 153 (10). Plaintiffs are informed
and believe, and thereon allege, that at all times relevant Defendant CUSTOMER
ELATION conducted business in the State of California and in the County of San Diego.

8. Defendant CUSTOMER ELATION provides call center services, web services, and
fulfillment services to business such as Defendant SCHWAN, which services include the
use of prerecorded messages to telephones for notification and advertisement purposes.

9. The actions alleged herein to have been undertaken by the Defendants were undertaken by
each defendant individually, were actions that each defendant caused to occur, were actions
that each defendant authorized, controlled, directed, or had the ability to authorize, control
or direct, and/or were actions each defendant assisted, participated in, or otherwise
encouraged, and are actions for which each defendant is liable. Each defendant aided and
abetted the actions of the defendants set forth below, in that each defendant had knowledge
of those actions, provided assistance and benefited from those actions, in whole or in part.
Each of the defendants was the agent of each of the remaining defendants, and in doing the
things hereinafter alleged, was acting within the course and scope of such agency and with
the permission and consent of other defendants.

FACTUAL ALLEGATIONS

10. On or about April 13, 2012, at approximately 12:03 p.m. Plaintiff, Knutson, received a telephone call on his cellular telephone from Defendant SCHWAN, through Defendant CUSTOMER ELATION, where Defendants used “an artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227 (b)(1)(A).
11. The telephone number Defendants called was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).
12. This telephone call constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

1 13. Plaintiff, Knutson, did not provide express consent to Defendants to receive calls on
2 Plaintiff's cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).
3 14. Plaintiff, Knutson, did not provide "prior express consent" to Defendants to place
4 telephone calls to Plaintiff, Knutson's, cellular phone with an artificial or prerecorded
5 voice as proscribed under 47 U.S.C. § 227(b)(1)(A).
6 15. On information and belief, the purpose of this telephone call was to solicit additional
7 business from Plaintiff, Knutson, under the guise that Plaintiff, Knutson, had a pending
8 delivery for merchandise, which would be delivered through Defendant. In actuality,
9 Plaintiff, Knutson, had not ordered any merchandise and Defendant was merely attempting
10 to solicit additional orders from Plaintiff, Knutson.
11 16. This telephone call by Defendants was in violation of 47 U.S.C. § 227(b)(1).
12 17. On or about August 16, 2012, 2012 at approximately 1:56 p.m., Plaintiff Lemieux,
13 received a telephone call on his cellular telephone from Defendant SCHWAN, through
14 Defendant CUSTOMER ELATION, where Defendants used "an artificial or prerecorded
15 voice" as prohibited by 47 U.S.C. § 227 (b)(1)(A).
16 18. The telephone number Defendants called was assigned to a cellular telephone service for
17 which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).
18 19. This telephone call constituted a call that was not for emergency purposes as defined by 47
19 U.S.C. § 227 (b)(1)(A)(i).
20 20. Plaintiff, Lemieux, did not provide express consent to Defendants to receive calls on
21 Plaintiff's cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).
22 21. Plaintiff, Lemieux, listened to the automated message and took down the telephone number
23 that was left. Immediately thereafter, Plaintiff, Lemieux, called the telephone number to
24 inquire about the automated call he received to his cellular telephone.

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1 22. Plaintiff, Lemieux, dialed the telephone number and was connected with a sales
2 representative from Defendants. Plaintiff, Lemieux, asked what the telephone call was for,
3 as he did not order any product from Defendants and was not expecting a delivery.
4 Defendants' sales representative acknowledged that Plaintiff, Lemieux, did not in fact
5 order any product and did not have a pending delivery. Defendants' sales representative
6 then informed Plaintiff that the purpose of the automated telephone call was to advise
7 Plaintiff that Defendants' outside sales representative would be in his neighborhood that
8 day and that if he desired to place orders for any products, to contact the outside sales
9 representative.

10 23. These automated telephone calls by Defendants were in violation of 47 U.S.C. § 227(b)(1).

CLASS ACTION ALLEGATIONS

11 24. Plaintiffs bring this action on behalf of themselves and on behalf of and all others similarly
12 situated persons ("the Class").

13 25. Plaintiffs represent, and are members of, the "Class," consisting of: All persons within the
14 United States who received any telephone call from Defendant or its agent/s and/or
15 employee/s to said person's cellular telephone made through the use of any automatic
16 telephone dialing system or with an artificial or prerecorded voice, which call was not
17 made for emergency purposes or with the recipient's prior express consent, within the four
18 years prior to the filing of this Complaint.

19 26. Defendants and their employees or agents are excluded from the Class. Plaintiffs do not
20 know the number of members in the Class, but believes the Class members number in the
21 tens of thousands, if not more. Thus, this matter should be certified as a Class action to
22 assist in the expeditious litigation of this matter.

23 27. Plaintiffs and members of the Class were harmed by the acts of Defendants in at least the
24 following ways: Defendants illegally contacted Plaintiffs and the Class members via their
25 cellular telephones thereby causing Plaintiffs and the Class members to incur certain
26 cellular telephone charges or reduce cellular telephone time for which Plaintiffs and the
27 Class members previously paid, by having to retrieve or administer messages left by

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1 Defendants during those illegal calls, and invading the privacy of said Plaintiffs and the
2 Class members. Plaintiffs and the Class members were damaged thereby.

3 28. This suit seeks only damages and injunctive relief for recovery of economic injury on
4 behalf of the Class and it expressly is not intended to request any recovery for personal
5 injury and claims related thereto. Plaintiffs reserves the right to expand the Class definition
6 to seek recovery on behalf of additional persons as warranted as facts are learned in further
7 investigation and discovery.

8 29. The joinder of the Class members is impractical and the disposition of their claims in the
9 Class action will provide substantial benefits both to the parties and to the court. The Class
10 can be identified through Defendants' records or Defendants' agents' records.

11 30. There is a well-defined community of interest in the questions of law and fact involved
12 affecting the parties to be represented. The questions of law and fact to the Class
13 predominate over questions which may affect individual Class members, including the
14 following:

15 a. Whether, within the four years prior to the filing of this Complaint, Defendants made
16 any call (other than a call made for emergency purposes or made with the prior
17 express consent of the called party) to a Class member using any automatic telephone
18 dialing system or an artificial or prerecorded voice to any telephone number assigned
19 to a cellular telephone service.

20 b. Whether Plaintiffs and the Class members were damaged thereby, and the extent of
21 damages for such violation; and

22 c. Whether Defendants should be enjoined from engaging in such conduct in the future.

23 27. As a person that received at least one call using an automatic telephone dialing system or
24 an artificial or prerecorded voice, without Plaintiffs' prior express consent, Plaintiffs are
25 asserting claims that are typical of the Class. Plaintiffs will fairly and adequately represent
26 and protect the interests of the Class in that Plaintiffs have no interests antagonistic to any
27 member of the Class.

28. Plaintiffs and the members of the Class have all suffered irreparable harm as a result of the
Defendants' unlawful and wrongful conduct. Absent a class action, the Class will continue

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1 to face the potential for irreparable harm. In addition, these violations of law will be
2 allowed to proceed without remedy and Defendants will likely continue such illegal
3 conduct. Because of the size of the individual Class member's claims, few, if any, Class
4 members could afford to seek legal redress for the wrongs complained of herein.

5 Plaintiffs have retained counsel experienced in handling class action claims and claims
6 involving violations of the Telephone Consumer Protection Act.

7 A class action is a superior method for the fair and efficient adjudication of this
8 controversy. Class-wide damages are essential to induce Defendants to comply with
9 federal and California law. The interest of Class members in individually controlling the
10 prosecution of separate claims against Defendants is small because the maximum statutory
11 damages in an individual action for violation of privacy are minimal. Management of
12 these claims is likely to present significantly fewer difficulties than those presented in
many class claims.

13 Defendants have acted on grounds generally applicable to the Class, thereby making
14 appropriate final injunctive relief and corresponding declaratory relief with respect to the
15 Class as a whole.

16 **FIRST CAUSE OF ACTION**

17 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT** 18 **47 U.S.C. § 227 *ET SEQ.***

19 Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though
20 fully stated herein.

21 The foregoing acts and omissions of Defendants constitute numerous and multiple
22 negligent violations of the TCPA, including but not limited to each and every one of the
23 above-cited provisions of 47 U.S.C. § 227 *et seq.*

24 As a result of Defendants' negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiffs and
25 The Class is entitled to an award of \$500.00 in statutory damages, for each and every
26 violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

27 Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such
28 conduct in the future.

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2 **SECOND CAUSE OF ACTION**
3 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
4 **TELEPHONE CONSUMER PROTECTION ACT**
5 **47 U.S.C. § 227 *ET SEQ.***

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37. Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.
38. The foregoing acts and omissions of Defendants constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*
39. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiffs and the Class are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
40. Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

19 **PRAYER FOR RELIEF**

20 Wherefore, Plaintiffs respectfully request the Court grant Plaintiffs and the Class members the following relief against Defendants, and each of them:

21 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**
22 **THE TCPA, 47 U.S.C. § 227 *ET SEQ.***

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- As a result of Defendants' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for themselves and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

29 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION**
30 **OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.***

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- As a result of Defendants' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiffs seeks for themselves and each Class member treble damages, as

1 provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47
2 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

3 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in
4 the future.
5 • Any other relief the Court may deem just and proper.

6 **TRIAL BY JURY**

7 Pursuant to the seventh amendment to the Constitution of the United States of America,
8 Plaintiffs are entitled to, and demand, a trial by jury.

9 Date: January 25, 2013

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